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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 766

JOHN R. ROGERS,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE DEEMED NECESSARY

Plaintiff's case was based upon two theories: (1) Respondeat Superior, under which he sought to hold the defendant company liable for the act of one of its employees, the co-defendant Coleman, in allegedly intentionally pulling a bench out from under plaintiff causing him to fall to the floor and sustain injuries; and (2) Direct Negligence, under which he sought recovery on the

proposition that the defendant company was negligent in not providing one of its work shops with sufficient accommodations to be used as a lunch room and that its failure to do so was a contributing cause of injuries inflicted upon one employee by another in a physical contest over the use of one bench.

Without further reference to the record it is sufficiently shown from the Petition that the evidence established the following controlling facts:

1. That the motivation for the alleged tort was purely personal. (Petition 7-8).

2. That the alleged tort was committed in violation of express rules of the company prohibiting such conduct. (Petition 8).

3. That the incident occurred in a work shop of the defendant company, the voluntary use of which for lunch and relaxation during the lunch period had merely been tolerated by defendant. (Petition 5-6).

4. That subsequent to the entry of summary judgment for the defendant company, which occurred at the conclusion of the plaintiff's evidence, the court overruled a similar motion of defendant Coleman and after receiving his evidence submitted the issues between these parties to the jury. The finding of the jury in favor of the defendant Coleman settled in his favor all matters in controversy between them. Petitioner has now abandoned his claim against Coleman and the judgment in this respect has become final.

ARGUMENT

The trial court's action in striking plaintiff's evidence at the conclusion of his case necessarily incorporated rulings as a matter of law that no jury issue had been made out on either of plaintiff's theories. Its action under the evidence before it was inevitable.

I. No Jury Issue Under Respondeat Superior Theory.

That there could be no recovery based on Respondeat Superior was an unavoidable conclusion in view of the admitted facts that under plaintiff's theory of the case a fellow employee had committed against him an intentional tort not in the course of his employment and not in furtherance of the company's business, but from a purely personal motivation. There is no recovery under The Federal Employees Liability Act in this event. *Davis* v. *Green*, 260 U.S. 349, 43 S. Ct. 123 (1922); *Jamison* v. *Encarnation*, 281 U. S. 635, 50 S. Ct. 440 (1930); *Hoyt* v. *Thompson*, 174 F. (2d) 284 (C.A. 7th, 1949).

Furthermore, this point has now become moot since the jury by its verdict has exonerated the co-employee from the charges which form the basis now urged as a grounds of recovery under the theory of Respondeat Superior.

II. No Jury Issue Under Direct Negligence Theory.

It is equally conclusive that no jury verdict could have been based on the evidence under any theory of direct negligence. Such evidence must justify with reason a con-

clusion that the employee was injured as a result, at least in part, of his company's negligence in exposing him to reasonably foreseeable danger from a fellow employee of dangerous propensities, or otherwise, *St. Louis–S. F. R. Co. v. Mills*, 271 U.S. 344, 46 S. Ct. 520 (1926).

There was no basis in the evidence for any inference that defendant Coleman was a man of dangerous propensities. Petitioner does not question this fact, but accepts the contrary conclusion admitting on pages 7-8 of Petition that plaintiff: "had never had any trouble with Coleman before, or even had any words with him prior to the incident (Tr. 38). There had been no horseplay prior to Coleman's pulling the stool from under him (Tr. 61). He ate lunch in the air house with Coleman most of the time (Tr. 132)."

Nevertheless, Petitioner argues that the jury would have been justified in concluding that plaintiff's injuries were attributable to negligence on the part of the defendant company in other respects. His contention is summarized in Petition page 23 as follows:

> "In conclusion, we submit that, under the authorities cited above, it was for the jury to determine whether the Railroad was guilty of any negligence in not foreseeing that due to the lack of seating space and the short time in which the men had to eat their lunch that one of the men might have a chair or bench pulled out from under him."

To reach this conclusion, Petitioner reasons that since the company knew that some of its employees chose to spend their lunch period in the air house, the duty arose to convert this work shop into an adequate lunch room and that failure to do so was a proximate cause of an injury

subsequently sustained in a contest between employees over one seat. No authority is cited for existence of any such duty nor any recognizable causal connection between its alleged violation and injuries inflicted by an intentional tort of the sort alleged in the case at bar. On the contrary, it is well settled that no recovery is possible under the F. E. L. A., under the direct negligence theory, for injuries suffered from an intentional tort of a fellow employee in the absence of evidence (1) that such employee was hired or retained by his employer with reason to know of his dangerous propensities, and (2) that the injury complained of was caused by such dangerous person in the course of his employment—i.e. not from purely personal motives. *Atlantic Coast Line R. Co.* v. *Southwell*, 275 U. S. 64, 48 S. Ct. 25 (1927); *Sheaf* v. *Minneapolis St. P. & S. S. M. R. Co.*, 162 F. (2d) 110 (C. A. 8th, 1947). The evidence of plaintiff himself having negatived any inference of these essential factors, no choice was left to the trial court but to rule summarily that no *prima facie* case had been made out of this theory.

CONCLUSION

The evidence of plaintiff himself having precluded any inference of the existence of those factors essential to recovery in the case at bar and having established concretely the existence of facts which negatived any such inference, there was no evidence upon which a verdict for plaintiff could stand. It is submitted that the action of the Virginia courts was clearly correct and no purpose

would be served by the writ requested. The Petition should thus be denied.

Respectfully submitted,

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